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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

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No. 422

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

KERR-McGEE CORPORATION, GULF OIL CORPORATION, GULF MINERALS CANADA LIMITED, AND GETTY OIL COMPANY,
Respondents.

PETITIONER'S REPLY BRIEF TO RESPONDENTS' OPPOSITION TO CERTIORARI

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TABLE OF CONTENTS

		Page
Point I:	This Court Should Resolve An Important Conflict In The Circuits On Whether District Court Orders Denying Attorney Disqualification Motions Are Immediately Appealable	2
	A. Petitioner Did Not And Could Not Waive Jurisdiction.	2
	B. Denials Of Attorney Disqualification Motions Are Not Immediately Appealable.	4
Point II:	The Court of Appeals Adopted An Unprecedented Conflict of Interest Standard.	6
Point III:	The Court of Appeals Improperly Invaded The Province Of The District Court.	8
Conclusion		10

TABLE OF CITATIONS

Statutes

28 U.S.C. § 1291 3,4,5
28 U.S.C. § 1292(b) 3,5

Cases

Abney v. *United States*, 431 U.S. 651 (1977) 5
American Fire & Cas. Co. v. *Finn*, 341 U.S. 6 (1951) 3
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) ... 4
California v. *LaRue*, 409 U.S. 109 (1972) 3
Cinema 5, Ltd. v. *Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976) 8
Coopers & Lybrand v. *Livesay*, ____ U.S. ____ (1978) ... 5,6

Cord v. *Smith*, 338 F.2d 516 (9th Cir. 1964), *clarified*, 370 F.2d 418 (9th Cir. 1966) 5

Emle Indus., Inc. v. *Patentex, Inc.* 478 F.2d 562 (2d Cir. 1973) 8

Gutierrez v. *Waterman Steamship Corp.*, 373 U.S. 206 (1963) 3

IBM v. *Levin*, 579 F.2d 271 (3d Cir. 1978) 3,8

In re April 1977 Grand Jury Subpoenas, ____ F.2d ____ (No. 77-1599) (6th Cir. Sept. 7, 1978) 3,4,5

Liberty Mutual Ins. Co. v. *Wetzel*, 424 U.S. 737 (1976) . 4

Mansfield, Coldwater & Lake Michigan Ry. v. *Swan*, 111 U.S. 379 (1884) 3

Owen Equip. & Erection Co. v. *Kroger*, ____ U.S. ____ (1978) 3

Schloetter v. *Railoc of Indiana, Inc.* 546 F.2d 706 (7th Cir. 1976) 3

Trone v. *Smith*, 553 F.2d 1207 (9th Cir. 1977) 5

United States v. *MacDonald*, ____ U.S. ____ (1978)..... 5

Other Citations

Comment, *Orders Denying Disqualification of Counsel*, 30 Vand. L. Rev. 259 (1977) 4

Note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chi. L. Rev. 450 (1978) 4,6

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Petitioner submits the following reply in response to the contentions raised in Respondents' Opposition to Certiorari.

POINT I

This Court Should Resolve An Important Conflict In The Circuits On Whether District Court Orders Denying Attorney Disqualification Motions Are Immediately Appealable.

Petitioner urges review of the question whether a district court order denying an attorney disqualification motion is immediately appealable as a "final decision." This is both an important issue and one on which there is need for this Court to resolve the existing conflict among the circuits. Respondents assert that petitioner somehow waived this threshold jurisdictional issue and that immediate appeal in this case was appropriate as a matter of public policy. Neither assertion has merit.

A. Petitioner Did Not And Could Not Waive Jurisdiction.

Respondents' waiver argument (pp. 10-11) is curious in the extreme. Contrary to respondents' characterization, petitioner specifically called the jurisdictional defect to the Court of Appeals' attention when it cited judicial authority contrary to, and academic criticism of, that Court's prior decision holding orders such as this immediately appealable. (Brief on Appeal p. 55)[1] The Court of Appeals rejected petitioner's jurisdictional argument when it specifically held that the order was appealable under the collateral order doctrine. (Pet. App. 54)

[1] Respondents also inaccurately suggest that Mr. Bartlit, one of petitioner's attorneys, conceded appealability during a District Court hearing and that this supposed concession "effectively prevent[ed]" respondents from pursuing other avenues of appeal. Apparently we are asked to believe that respondents and their counsel relied upon opposing counsel to protect their rights. In fact, Mr. Bartlit was simply (and accurately) stating the Seventh Circuit's doctrine of

[footnote continued on following page]

The waiver argument is even more surprising because respondents concede (p. 11) that "this Court may review jurisdiction at any time." In fact, an unbroken line of decisions holds that, because federal jurisdiction is grounded in law and cannot be conferred by consent of the parties, this Court *must* consider the question of jurisdiction *sua sponte*. E.g., *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884); *California* v. *LaRue*, 409 U.S. 109, 113 n.3 (1972).

In the next breath, however, respondents attempt to resurrect discredited waiver principles by referring to the general rule that this Court will exercise "discretion" to deny certiorari when the issue presented has not been raised below. But that doctrine does not apply to jurisdictional questions,[2] precisely because litigants cannot confer federal jurisdiction through waiver, consent, or silence. Thus, this Court will consider jurisdiction even if a party "candidly admits failure to raise the point below," *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 209 (1963), or if the party himself asserted jurisdiction below, *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951), or indeed if the party actively concealed the jurisdictional defect in the lower court, *Owen Equip. & Erection Co.* v. *Kroeger*, ____ U.S. ____ n.21 (1978).

[footnote continued from preceding page]

appealability, as set forth in *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976). Since *Schloetter* was binding on the District Court, absolutely no purpose would have been served by an argument to the District Judge that the Court of Appeals should reconsider its prior holding. In any event, Mr. Bartlit's statement hardly prevented respondents from seeking review by some other means. See, for example, *In re April 1977 Grand Jury Subpoenas*, No. 77-1599, ____ F.2d ____ (6th Cir. Sept. 7, 1978), in which the party who had unsuccessfully moved for disqualification filed a notice of appeal under section 1291 and sought certification under 28 U.S.C. § 1292(b). See also *IBM* v. *Levin*, 579 F.2d 271, 278 (3d Cir. 1978) (appeal and mandamus).

[2] Significantly, none of the five cases cited in support of the general rule (p. 11 n.7) was concerned with a jurisdictional question.

Jurisdictional questions concerning the immediate appealability of assertedly "final" district court orders are no exception. As this Court stated in *Liberty Mutual Ins. Co.* v. *Wetzel,* 424 U.S. 737 (1976), when vacating a court of appeals' decision on the merits because the district court order was not final within the meaning of section 1291:

> Though neither party has questioned the jurisdiction of the Court of Appeals to entertain the appeal, we are obligated to do so on our own motion if a question thereto exists. (*Id.* at 740)

See also *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962).

Respondents' related suggestion that the appealability issue is not "ripe" and that the arguments for and against have not been brought into "focus" is belied by the fact, stressed by respondents themselves, that all but one of the circuits have already ruled on the matter, albeit inconsistently.[3] The appealability of disqualification denials warrants review now, since additional lower court cases will result, as did this case, in mere citations, without analysis, of prior decisions either granting or denying appeal.

B. Denials Of Attorney Disqualification Motions Are Not Immediately Appealable.

As petitioner noted (p. 13), a clear conflict exists between those circuits which allow immediate appeal[4] and the District of

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[3] In addition, commentators have thoroughly analyzed the problem from both perspectives. *Compare,* Note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts,* 45 U. Chi. L.Rev. 450 (1978), *with* Comment, *Orders Denying Disqualification of Counsel,* 30 Vand. L.Rev. 259 (1977).

[4] Petitioner also noted that some of these circuits have expressed reservations about allowing immediate appeals. (Petition p. 13 & n.14) The Sixth Circuit's recent *en banc* decision in *In re April 1977 Grand Jury Subpoenas,* No. 77-1599, ____ F.2d ____ (6th Cir. Sept. 7, 1978), adopting the government's position that denial of disqualification in a criminal case is not appealable, casts doubt, as Judge

[footnote continued on following page]

Columbia and the Ninth[5] Circuits, which do not. Respondents completely gloss over the need to resolve this conflict and to eliminate the confusion concerning this important jurisdictional issue. Respondents fail even to cite, let alone discuss, this Court's decisions in *Coopers & Lybrand* v. *Livesay,* ____ U.S. ____ (1978), *United States* v. *MacDonald,* ____ U.S. ____ (1978), and *Abney* v. *United States,* 431 U.S. 651 (1977), all of which define that "small class" of decisions appealable under the collateral order doctrine. More seriously, respondents fail even to attempt the substantive analysis required by these decisions. Other glaring deficiencies in respondents' argument warrant brief comment.

First, respondents' repeated reference (*e.g.,* pp. 11, 14) to the assertedly serious nature of the ethical questions in this particular case constitutes precisely the kind of *ad hoc* approach this Court rejected in *Coopers & Lybrand* v. *Livesay,* which held that immediate appealability depends upon whether the *category* of district court orders satisfies the collateral order doctrine, not whether individual litigants consider their cases important.

Second, by asserting that most disqualification motions are not frivolous o. filed merely for delay (p. 12), respondents suggest, without any support whatsoever, that the good faith of a disappointed movant is sufficient to transform an interlocutory order into an appealable one.

[footnote continued from preceding page]

Weick's dissent points out (Slip Op. 25-29), as to the current rule in that Circuit. A petition for certiorari in that case will be filed on or before Nov. 7, 1978.

[5] Respondents are in error (p. 12 n.9) that the Ninth Circuit has departed from its decision in *Cord* v. *Smith,* 338 F.2d 516 (1964), *clarified,* 370 F.2d 418 (9th Cir. 1966). *Trone* v. *Smith,* 553 F.2d 1207 (9th Cir. 1977), the case cited by respondents, held only that an order denying attorney disqualification is not certifiable under section 1292(b). Such a decision, by a two-judge panel, does not *sub silentio* overrule *Cord* v. *Smith,* particularly since section 1291 was not even mentioned and since the uniform practice among the courts of appeals is that prior decisions can be overruled only *en banc.*

Third, respondents assert (pp. 13-14), without reasoned discussion, that public confidence in the legal profession would be irretrievably lost if immediate appeals are not permitted. No support is adduced for this broad factual contention, the validity of which is far from obvious. As one commentator recently observed, this argument "almost surely exaggerates the public's awareness of disqualification disputes." Note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chi. L.Rev. 450, 459 (1978). Indeed, there is simply no reason to believe that a thoughtful district court opinion and a second opinion on ultimate appeal are insufficient to maintain public confidence in the bar. In fact, immediate appealability may foster public cynicism to the extent it encourages further use of disqualification motions as a litigation tactic. In all events, however, "[s]uch policy arguments, though proper for legislative consideration, are irrelevant to the issues [this Court] must decide." *Coopers & Lybrand* v. *Livesay*, ___ U.S. ___ (1978).

POINT II

The Court Of Appeals Adopted An Unprecedented Conflict Of Interest Standard.

Respondents assert (p. 15) that petitioner has "substantially mischaracteriz[ed]" the Court of Appeals' holding in an effort to portray it as "unprecedented." They say the Court of Appeals' conclusion that a lawyer-client relationship existed rested upon "Kirkland's conduct, not simply [respondents'] 'belief' alone." Yet the only "conduct" adverted to is Kirkland's receipt of information from respondents as part of Kirkland's representation of a trade association with thousands of members.

Contrary to respondents' contention, the District Court recognized, and petitioner agrees, that an attorney-client relationship can be established by implied, as well as express, consent and that consent "may be implied from the conduct of the parties."[6] The fact that Kirkland obtained *some*[7] confidential information from respondents in its representation of a trade association is, of course, a factor to be considered in determining whether a lawyer-client relationship had been established. The District Court was well aware of that fact, gave it careful consideration (Pet. App. 30-31), and found, on *all* the evidence, that no professional relationship existed.

The Court of Appeals formulated a far different standard, one which makes any form of an attorney's consent irrelevant. Under the Court's analysis, an attorney-client relationship is established whenever the putative client submits confidential information in what is later asserted to be a belief that the recipient was acting as his lawyer. The consent—even the knowledge—of the attorney is irrelevant. The focus is *entirely* upon the putative client, and the "reasonable belief" of that "client" suffices to impose on the attorney the full range of duties inherent in the attorney-client relationship. The Court's holding is, as we have urged (pp. 17-22), not only wholly unprecedented but one which, because of its consequences, warrants plenary review hereof.

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[6] The Court of Appeals quotes this language from the opinion of the District Court. (Pet. App. 66)

[7] Respondents' statement of facts creates the impression that Kirkland had contact only with them and that they spent much of the time providing confidential information. The facts are far different, as the District Court set out at length. (Pet. App. 8-16) Kirkland represented a large trade association, during which time it surveyed many of the members by questionnaire and by interview. In the course of this survey the respondents provided confidential statistical information which was later returned without disclosure.

POINT III

The Court Of Appeals Improperly Invaded The Province Of The District Court.

Respondents assert (p. 17) that this is not a case in which the Court of Appeals ignored the District Court's findings of fact, but simply one in which it applied a different legal standard to undisputed facts. Quite the contrary, the Court of Appeals repeatedly stated that respondents had a "reasonable belief" (Pet. App. 53, 70, 73) that Kirkland was representing them, despite findings of fact by the District Court which essentially refute the genuineness and reasonableness of the asserted belief. Because the District Court quite properly considered all the evidence, including the parties' *contemporaneous* expressions and conduct, it was not called upon to rule specifically on the veracity of respondents' after-the-fact assertions. However, the District Court's exhaustive discussion of the objectively verifiable facts substantially undermines, if not flatly contradicts, respondents' litigation affidavits. Absent an opportunity for the District Court to specifically rule on the truth of the litigation affidavits, the Court of Appeals should not have treated the affidavits as dispositive.

Respondents' final contention is that the Court of Appeals properly ordered disqualification. The argument is simply asserted (p. 18) with unexplained reference to ***IBM*** v. ***Levin***, 579 F.2d 271, 282-283 (3d Cir. 1978), and ***Emle Industries, Inc.*** v. ***Patentex, Inc.***, 478 F.2d 562, 570-571 (2d Cir. 1973). Neither case, however, held that disqualification is invariably required in multiple representation cases, and in fact the Third Circuit affirmed disqualification in ***IBM*** on the ground that the district court had not abused its discretion. *Id.* at 283. ***Emle Industries*** contained no discussion of the standard of review, but subsequently the Second Circuit expressly noted that it had no occasion to determine whether disqualification is mandatory in every case. ***Cinema 5, Ltd.*** v. ***Cinerama, Inc.***, 528 F.2d 1384, 1387 (2d Cir. 1976). Perhaps in "standard" instances of an attorney's multiple representation of *known* clients, disqualification is an acceptable remedy[8] if there are no other countervailing considerations. In this case, however, the District Court found that the ethical facts fall into a gray area, the Court of Appeals conceded the "novel[ty]" of the questions presented, and not even respondents contend that Kirkland knew of its alleged attorney-client relationship with them. Moreover, despite respondents' repeated efforts to obscure the fact (pp. 8-9, 20), the District Court expressly recognized the public importance of Kirkland's continued representation of petitioner. In these circumstances, unless the District Court in fact had no discretion whatever and disqualification is always automatic, the Court of Appeals plainly usurped the District Court's prerogatives.

[8] This seems to be the assumption of both the Second and Third Circuits. Whether that rule is too rigid is itself an important question, but one which need not be addressed here.

CONCLUSION

Respondents have failed in their attempt to discount the importance of the questions presented in the petition. Indeed, the very arguments advanced by respondents underscore the need to resolve the conflict among the circuits on the threshold jurisdictional issue, the need for this Court to resolve whether an attorney-client relationship can be imposed absent the lawyer's knowledge or express or implied consent, and the need to preserve the district courts' prerogative in ethical disputes to find facts and fashion relief. Review of these issues is especially appropriate in this instance, where petitioner's chosen and well prepared counsel has been excluded from an antitrust case which itself is of nationwide significance. Consequently, for the reasons stated in the petition, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

October 18, 1978

Respectfully submitted,

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